Supreme Court, U.S.
FILED

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No. _____

In The
Supreme Court of the United States

Ronald G. Harris,
Susette M. Harris, Petitioners
v.
United States of America

On Petition for Writ of Certiorari to the United States Court of Appeals to the Fifth Circuit

Petition for Writ of Certiorari

Petitioners:
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Ronald G. Harris
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20pp

QUESTIONS PRESENTED FOR REVIEW

1. Does the plain language of 26 USC §6103 preclude distinguishing between return information in the public record that is recorded on an Internal Revenue agency document and return information recorded on a non-Internal Revenue agency document and if so, bars disclosure of return information to the press regardless of the source?

The public record contains return information. Some return information is publicly recorded on official Internal Revenue documents such as a notice of tax lien. Other return information is recorded in the public record on non-Internal Revenue documents such as real property record filings (assets and liabilities), judgments (income owed or due), and security instruments.

Thus, the public record is composed of two sources of return information: Internal Revenue documents and non-Internal Revenue documents.

The Fifth Circuit and the Seventh Circuit have concluded that if a disclosure to the press is based upon a non-Internal Revenue document in the public record such as a judgment or court proceedings, then the disclosure is authorized even though not based upon one of the exceptions enumerated in 26 U.S.C. §6103.

2. Is the good faith defense pursuant to 26 U.S.C. §7341(b) jurisdictional and therefore not subject to the rules of notice pleading and Rule 8(c) of the Federal Rules of Civil Procedure?

The government has waived sovereign immunity for unexcepted disclosures of return information. The government codified that no liability shall arise from a disclosure "which results from a good faith but erroneous interpretation of section 6103." Good faith is similar to qualified immunity available to public officials.

The Fifth Circuit Court of Appeals ruled that a defense of good faith under Section 7431(b) is jurisdictional and can be raised at any time by the United States or by the Court *sua sponte*.

PARTIES TO THE PROCEEDING

Petitioners:

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TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i
PARTIES TO THE PROCEEDING iii
TABLE OF CONTENTS iv
TABLE OF AUTHORITIES v
OPINIONS vii
STATEMENT OF JURISDICTION viii
RELEVANT STATUTES ix
PETITION FOR WRIT OF CERTORIARI 1
CONCISE STATEMENT OF THE CASE 1
QUESTION 1 1
QUESTION 2 2
ARGUMENT 3
QUESTION 1 ..... *3*
ARGUMENT 5
QUESTION 2 ..... *5*
CONCLUSION 7
APPENDIX 8
CERTIFICATE OF SERVICE 11
CERTIFICATION 12

TABLE OF AUTHORITIES

Cases

Harlow v. Fitzgerald, 457 U.S. 800, 816 (1982)... 5

Johnson v. Sawyer, 120 F.3d 1307 (5th Cir. 1997)..... 2

Lampert v. U.S., 854 F.2d 335, 338 (9th Cir. 1988), cert. denied 490 U.S. 1034 (1989)..... 3

Mallas v. U.S., 993 F.2d 1111 (4th Cir. 1993), ... 3

Rice v. U.S., 1999 U.S. App. LEXIS 1122, 99-1 U.S.C. ¶ 50224 (10th Cir. 1999). 3

Rodgers v. Hyatt, 697 F.2d 899, 904 (10th Cir. 1983)..... 3

Ronald G. Harris, Susette M. Harris v. United State of America, NO. 01-20543(5th Cir. April 17, 2002)..... vii

Ronald G. Harris, Susette M. Harris v. United State of America, NO. 01-20543, On Petition for Rehearing (5th Cir. July 1, 2002)..... vii

Ronald G. Harris, Susette M. Harris v. United States of America, H-99-CV-1940 (USDC S.D. TX) vii

Rowley v. United States, 76 F.3d 796 (6th Cir.1996),..... 3

Thomas v. United States, 890 F.2d 18, 21 (7th Cir. 1989), *aff'g* 671 F. Supp. 15, 16 (E.D. Wis. 1987) 3

United States v. Harris, H-89-CV-2543 (USDC S.D. TX, 1992), ... 1

William E. Schrambling Accountancy Corp. v. United States, 937 F.2d 1485, 1489 (9th Cir. 1991), ... 3

Statutes:

26 U.S.C. §7341(b) ii

26 USC §6103 i

26 USC §6103(b)(4). 1

26 USC §6335 1

28 USC §1746 8

28 USC §2101(c). ix

28 USC §7431(a)(1). 1

Other Authorities:

5 C. Wright & A. Miller, Federal Practice and Procedure 1271 (1969) 6

Rules

10(a) of the Supreme Court Rules 3

Fed. Rule Civ. Proc. 8 (c) 5

OPINIONS

Ronald G. Harris, Susette M. Harris v. United States of America, H-99-CV-1940 (USDC S.D. TX)

Ronald G. Harris, Susette M. Harris v. United State of America, NO. 01-20543(5th Cir. April 17, 2002)

Ronald G. Harris, Susette M. Harris v. United State of America, NO. 01-20543, On Petition for Rehearing (5th Cir. July 1, 2002)

STATEMENT OF JURISDICTION

SEE REFORMATTED SEPARATE APPENDIX

The district court entered its opinion and final judgment on April 2, 2001.

A Fifth circuit panel entered its opinion on April 17, 2002 and petition for rehearing was denied on July 1, 2002.

Jurisdiction for this petition is found at 28 USC §2101(c).

RELEVANT STATUTES

See appendix included in this petition.

PETITION FOR WRIT OF CERTORIARI

CONCISE STATEMENT OF THE CASE

QUESTION 1

The basis for district court jurisdiction was under authority of 28 USC §7431(a)(1).

The following material, undisputed facts are related to the disclosure of the Harrises' amount of their tax liability to a newspaper reporter after the federal tax auction of their principal residence.

The disclosure occurred at the Montgomery County Courthouse, Conroe, Texas.

The Harrises' principal residence was subject to auction for their federal tax liabilities. 26 USC §6335. The seizure and sale of the Harrises' residence was a not forfeiture under the Internal Revenue laws or any other laws.

Revenue Officer Carabeth Luckey, the officer in charge of the Collectibility investigation and the auction, told a newspaper reporter Geoff Drushell that the Harrises owed "hundreds of thousands of dollars in taxes for a five year period beginning in 1978." This statement was made after the sale of the Harrises' principal residence and not in connection with any tax administration as defined under 26 USC §6103(b)(4).

Luckey testified later that when she made this statement she was referring to the federal judgment that was filed in the Montgomery County Courthouse. This judgment, *United States v. Harris*, H-89-CV-2543 (USDC S.D. TX, 1992), reduced to judgment the Harrises' federal income tax liabilities for 1978 through 1982. The amount

of the Harrises' tax liabilities in the judgment totaled $212,747.42.

In that same courthouse were notices of federal tax lien-Form 668(Y) filed against the Harrises by Officer Luckey. Luckey filed theses notices of federal tax lien the Friday before the auction on Tuesday. Those notices specified the amount of the Harrises' tax liability for those same tax years referred to by Luckey in her statement to the reporter.

Luckey's statement that the Harrises owed "hundreds of thousands of dollars in taxes" was published the next day in the Conroe Courier, a local newspaper.

The Harrises sued for unauthorized disclosure.

Officer Luckey defended on the basis that the disclōsure was in the public record and therefore not confidential relying on *Johnson v. Sawyer*, 120 F.3d 1307 (5th Cir. 1997). Luckey did not defend on the basis that her disclosure was excepted under Section 6103.

QUESTION 2

The Harrises timely filed a complaint for unauthorized disclosure by Revenue Officer Carabeth Luckey. The United States filed a timely answer. In that answer the United States did not preserve a good faith defense pursuant to Section 7431(b). The United States' amended answer again did not preserve good faith.

The Harrises proceeded through discovery based upon the defenses asserted in the United States' answer.

After the conclusion of discovery, the United States raised good faith for the first time in its Motion for Summary Judgment. The district court found the applicable Internal Revenue manual procedure provided a good faith basis for an erroneous interpretation.

ARGUMENT

QUESTION 1

The basis for the petition is found at Rule 10(a) of the Supreme Court Rules.

The decision of the Fifth Circuit conflicts with the decisions of the Fourth circuit in *Mallas v. U.S.*, 993 F.2d 1111 (4th Cir. 1993), the Sixth circuit in *Rowley v. United States*, 76 F.3d 796 (6th Cir.1996), the Ninth circuit in *Lampert v. U.S.*, 854 F.2d 335, 338 (9th Cir. 1988), cert. denied 490 U.S. 1034 (1989) followed by *William E. Schrambling Accountancy Corp. v. United States*, 937 F.2d 1485, 1489 (9th Cir. 1991), cert. denied. 502 U.S. 1066 (1992), and the Tenth circuit in *Rodgers v. Hyatt*, 697 F.2d 899, 904 (10th Cir. 1983) distinguished by *Rice v. U.S.*, 1999 U.S. App. LEXIS 1122, 99-1 U.S.C. ¶ 50224 (10th Cir. 1999).

The decision is in accord with the Fifth circuit in *Johnson v. Sawyer*, 120 F.3d 1307 (5th Cir. 1997) and the Seventh circuit in *Thomas v. United States*, 890 F.2d 18, 21 (7th Cir. 1989), *aff'g* 671 F. Supp. 15, 16 (E.D. Wis. 1987).

The present state of the law allows for three different applications of Section 6103 regarding disclosure of return information that is in the

public record regardless if the disclosure is excepted under the law.

The Fourth circuit in *Mallas*, supra and the Tenth circuit in *Rodgers*, supra have held that there is no exception permitting the disclosure of return information simply because it is otherwise available to the public.

The Sixth circuit in *Rowley*, supra and the Ninth circuit in *Lampert*, supra have held that that a taxpayer may no longer claim a right of privacy of that information once return information is in the public record.

The Seventh circuit in *Thomas*, supra held no violation of Section 6103 occurs if the "immediate source is a public document lawfully prepared by an agency that is separate from the [IRS] and has lawful access to tax returns."

The Fifth circuit in *Johnson v. Sawyer*, 120 F.3d 1307 (5th Cir. 1997), adopted the "independent source" test, referred to in *Thomas*, supra, permitting the IRS to publicize information taken directly from court documents or records of public proceedings rather than from IRS files.

Petitioners believe that the plain language of Section 6103 precludes making any distinction between sources of return information in the public record. Congress has provided that:

> "Returns and return information shall be confidential, and except as authorized by this title--
>
> (1) no officer or employee of the United States...
>
> shall disclose any return or return information obtained by him in any manner in connection with his service

as such an officer or an employee or otherwise or under the provisions of this section.

The phrase "obtained by him in any manner" means what it says. This is a broad phrase that encompasses any mode, method, or source in obtaining return information.

The definition of return information makes no distinction between private information and public information or sources. Further, the statute does not address privacy concerns or issues. The thrust of Section 6103 is confidentiality. The information obtained by an Internal Revenue official is to be held in confidence or trust regardless of the source.

ARGUMENT

QUESTION 2

The basis for the petition is found at Rule 10(a) of the Supreme Court Rules.

The Supreme Court defined "good faith" immunity is an "affirmative defense that must be pleaded by a defendant official." *Harlow v. Fitzgerald*, 457 U.S. 800, 816 (1982) citing *Gomez v. Toledo*, 446 U.S. 635(1980).

Further, the Supreme Court in *Gomez* at 641 stated that:

> "Moreover, this Court has never indicated that qualified immunity is relevant to the existence of the plaintiff's cause of action; instead we have described it as a defense available to the official in question. (Citations omitted.) Since qualified immunity is a defense, the burden of pleading it rests with the defendant. See Fed. Rule Civ. Proc. 8 (c) (defendant must plead any "matter constituting an avoidance or affirmative defense"); 5 C. Wright & A. Miller, Federal Practice and Procedure 1271 (1969). It is for the official to claim that his conduct was justified by an objectively reasonable belief that it was lawful."

Good faith immunity pursuant to 26 USC §7431(b) is an affirmative defense that must be pled and preserved by the government in its initial response to the allegation that an unauthorized disclosure has occurred. If good faith is not preserved the government is precluded asserting good faith in a subsequent pleading.

Good faith immunity from liability as codified at §7431(b) is not analogous to sovereign immunity from suit such as Federal Tort Claims Act limitations to certain causes of actions or jurisdiction derived from a limitation of action statute.

In *Harlow* the Court ruled "reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, should avoid excessive disruption of

government and permit the resolution of many insubstantial claims on summary judgment."

Petitioners agree with the above objective standard as applied to good faith under Section 7431. However, allowing the United States to disregard the rules of procedure by not notifying the Plaintiffs of a good faith defense as a matter of law works an injustice to the Plaintiffs.

If government is given the benefit of the objective standard to avoid excessive disruption of government, then the taxpayer should have the benefit of the rules to avoid unnecessary expense of resources pursuing noticed defenses and then lose any right of recovery of those resources based upon a new defense or sovereign immunity.

CONCLUSION

Taxpayers in Texas should have the same rights as taxpayers in Virginia or New Mexico under Section 6103. Section 6103 is not preempted or controlled by state privacy laws. Application should be uniform throughout the United States. For this reason, the petition should be granted.

The petition should be granted to resolve the question of good faith immunity as an affirmative defense and the government's burden under the rules of procedure in pleading good faith.

APPENDIX

RELEVANT STATUTE
(in part)

26 USC Sec. 6103. Confidentiality and disclosure of returns and return information

(a) General rule

Returns and return information shall be confidential, and except as authorized by this title--

(1) no officer or employee of the United States,

(2) no officer or employee of any State, any local child support enforcement agency, or any local agency administering a program listed in subsection (l)(7)(D) who has or had access to returns or return information under this section, and

(3) no other person (or officer or employee thereof) who has or had access to returns or return information under subsection (e)(1)(D)(iii), paragraph (6) or (12) of subsection (l), paragraph (2) or (4)(B) of subsection (m), or subsection (n),

shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer or an employee or otherwise or under the provisions of this section.

26 USC Sec. (b)(2) Return information

The term "return information" means--

(A) a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense, and

(B) any part of any written determination or any background file document relating to such written determination (as such terms are defined in section 6110(b)) which is not open to public inspection under section 6110, but such term does not include data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer. Nothing in the preceding sentence, or in any other provision of law, shall be construed to require the disclosure of standards used or to be used for the selection of returns for examination, or data used or to be used for determining such standards, if the Secretary determines that such disclosure will seriously impair assessment, collection, or enforcement under the internal revenue laws.

26 USC Sec. (b)(8) Disclosure

The term "disclosure" means the making known to any person in any manner whatever a return or return information.

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In The
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Ronald G. Harris,
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v.
United States of America

On Petition for Writ of Certiorari to the
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Separate Reformatted Appendix of Decisions

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 01-20543

RONALD G. HARRIS, SUSETTE M. HARRIS
Plaintiffs-Appellants

v.

UNITED STATES OF AMERICA
Defendant-Appellee

Appeal from the United States District Court for the Southern District of Texas, Houston

ON PETITION FOR REHEARING AND
REHEARING EN BANC

(OPINION 4/17/02, 5 Cir. _____,
_____ F. 3d _____)

Before KING, Chief Judge, REAVLEY and WEINER, Circuit Judges,
PER CURIAM:

(X) The petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. AND 5th Cir R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and that court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FED. R. APP. P. and 5th Cir. R. 35) the petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

S/: THOMAS M. REAVLEY
UNITED STATES CIRCUIT JUDGE

U. S. COURT OF APPEALS
FILED
JUL 1 2002
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CLERK'S NOTE
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 01-20543

RONALD G. HARRIS, SUSETTE M. HARRIS
Plaintiffs-Appellants

v.

UNITED STATES OF AMERICA
Defendant-Appellee

Appeal from the United States District Court for the Southern District of Texas (USDC No. H-99-CV-1940)

Before KING, Chief Judge, REAVLEY and WEINER, Circuit Judges:

PER CURIAM:•

Ronald and Susette Harris appeal the summary judgment entered against them in their suit against the United States for wrongful collection of taxes and wrongful disclosure of tax information. We affirm.

• Pursuant to 5th Cir. R. 47.5,the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

A. Wrongful Collection.

The district court concluded that the wrongful collection claims were barred by the applicable statute of limitations, 26 U.S.C §7433(d)(3). The suit was filed on June 21, 1999. On appeal, the Harrises argue that their wrongful collection claims were not time-barred insofar as they asserted a claim for wrongful governmental conduct occurring on or after June 21, 1997. They abandon all other wrongful collection claims on appeal. The government more or less concedes that the Harrises are correct in this regard, because June 19, 1997 was a Saturday, and under Fed. R. Civ. P 6(a), the deadline for filing a claim was extended to the following Monday, in this case June 21, 1999.

However, we agree with the government that we should not disturb the judgment because an alternative basis for dismissing this claim on the merits exists. We will not reverse a judgment if the district court can be affirmed on any ground, regardless of whether the district court articulated the ground. *United Indus., Inc. v. Simon-Hartley, Ltd.*, 91 F.3d 762, 765 n.6 (5th Cir. 1996).

"We are free to uphold the district court's judgment on any basis that is supported by the record." *Zuspann v. Brown*, 60 F.3d 1156, 1160(5th Cir. 1995).

The Internal Revenue Code provides taxpayers with a cause of action for damages against the United States where "any officer or employee of the Internal Revenue Service recklessly or intentionally disregards any

provision of" the Code. 26 U.S.C. § 7433(a). The Harrises argue that Internal Revenue Service (IRS) agent Carabeth Luckey violated section 7122 of the Code, 26 U.S.C. §7122. Section 7122(a) provides:

> The Secretary may compromise any civil or criminal case arising under the internal revenue laws prior to reference to the Department of Justice for prosecution of defense; and the Attorney General or his delegate may compromise any such case after reference to the Department of Justice for prosecution or defense.

We interpret this statute to mean that once the case is turned over to the Department of Justice (DOJ), the authority to settle the case rests with the DOJ rather than the IRS.

As we understand the wrongful collection claim relating to events occurring on June 19, 1997 and thereafter, the Harrises complain that agent Luckey and perhaps others acted in violation of the Code in the manner they handled a settlement offer from the Harrises prior to the sale of their house to partially satisfy the tax judgment. They allege, for example, in paragraph 29 of their amended complaint that "Officers Carabeth Luckey, Chief Felix Carrillo, Group Manager Barbara Howze, [an] unknown official of the Department of Justice and other in connection with collection did recklessly or intentionally disregard " §7122 and "rejected the Harris' offer of $45, 000.00 by asserting that the Department of Justice had authority pursuant to" §7122.

Even under a liberal construction of the complaint. See *Brinkman v Johnson*, 793 F.2d 111, 112(5th Cir. 1986)(noting that pro se complaints are construed liberally), we conclude that summary judgment was warranted on the wrongful collection claim. The case had been referred to the DOJ long before June 19, 1997, and the DOJ therefore ad authority to settle the claim. To the extent the Harrises claim otherwise they are legally mistaken. The Harrises failed to demonstrate any basis under which the DOJ was under a statutory obligation to settle the case for less than the amount of the judgment for unpaid taxes. The 1993 judgment far exceeded the settlement offer from the Harrises. To the extent the Harrises are arguing that Luckey, an IRS agent, had no authority to convey settlement-related communications, such communications do not constitute a statutory violation. The authority of the DOJ to settle the case under §7122(a) dos not in our view prohibit an IRS agent from conveying settlement communications to and from the DOJ.

To the extent that the Harrises are arguing that Luckey failed to communicate their settlement offer to the DOJ, we do not think such a failure constitutes a statutory violation in these circumstances. The record indicates that the Harrises had attempted to settle their tax liability directly with the DOJ as early as 1993. The record also contains an affidavit from Luckey indicating that she had discussed settlement with her superiors and had been told that DOJ would not accept a settlement offer of $45, 000 the Harrises were proposing. The Harrises do not persuade us that Luckey was

under a statutory obligation to convey a settlement offer she believed and had been told the DOJ would reject, when the Harrises were free to do so themselves. Further, the Harrises failed to show, under this theory of liability, that DOJ would have accepted their settlement offer if it had been conveyed, or that they were forced to settle for a larger amount because their offer was not communicated, hence failed to "actual, direct economic damages sustained by the plaintiff as a proximate result of the " conduct of Luckey under 26 U.S.C. §7433(b)(1).

B. Wrongful Disclosure.

With regard to the wrongful disclosure claim under 26 U.S.C. §7431, applicable to violations of the confidentiality requirements of 26 U.S.C. §6103, we agree with district court's analysis of this issue. The comments of IRS spokesman Henry Holmes made to the Conroe Courier reporter were of a general nature, were not based upon personal knowledge of the Harrises' "return information" under 26 U.S.C. § 6103(b)(2), and do not constitute the disclosure of such. Holmes was instead discussing general IRS policies.

The record indicates that IRS officer Luckey was the source of the statement in the article that "IRS agents on hand...confirmed that the taxes owed by the Harrises for a five-year period beginning in 1978 totaled in the 'hundreds of thousands of dollars.'" To the extent that the public record federal court judgment, on file with county real estate records as well, was the "immediate source" of this

disclosed information, a violation of § 6103 did not occur. See Johnson v. Sawyer, 120 F.3d 1307, 1321 n.1 1323(5th Cir 1997). In her affidavit Luckey states:

> *I* explained [to the reporter] that there was a judgment on record in the Montgomery County Court House which was a matter of public record and that he could obtain a copy from the clerk. I explained that the recorded judgment listed the plaintiffs' liability which, beginning in 1978, totaled in the amount of hundreds of thousands of dollars.

To the extent that there was a material issue of fact as to whether the immediate source of the disclosure of the Harrises' tax liability was the judgment itself, we agree with the district court that the disclosure was nevertheless subject to the good faith defense of § 7431(b). We have little to add to the district court's analysis, but make the following observations to respond to certain arguments raised on appeal.

The Harrises argue that Johnson and its rejection of a general "public records" exception to § 6103 was already clearly established as the time of the conduct in issue, because the district court in Johnson had already ruled. In *Huckaby v. United States*, 794 F. 2d 1041, 1048(5th Cir. 1986), we held that the good faith defense under § 7431(b) is analogous to the civil rights qualified immunity defense, which looks to whether the official violated "clearly established statutory or constitutional rights of which a reasonable person would have known." Id.

(quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818(1982). Under analogous civil rights law, we have stated that in determining whether a right is clearly established, we are confined to precedent from our circuit or the Supreme Court. *Boddie v. City of Columbus*, 989 F. 2d 748(5th Cir. 1993). Therefore, the district court's decision in Johnson did not in our view "clearly establish" the absence of a public records exception for purposes of the § 7431(b) good faith exception. To the extent that uncertainty might exist on this question, we should find the good faith exception applicable, since the good faith exception limits the government's waiver of sovereign immunity, and such waivers must be strictly construed in favor of the government. *United States v. Nordic Village, Inc.*, 503 U.S. 30, 34(1992).

The Harrises also argue that the government waived the good faith defense by failing to assert it in its answer. The government did assert the defense in its motion to dismiss and for summary judgment, filed before the district court granted plaintiffs leave to file an amended complaint. Regardless, we again note that the good faith defense is a limitation on the government's waiver of sovereign immunity. Absent a waiver of sovereign immunity, the district court had no jurisdiction. *Truman v. United States*, 26 F.3d 592, 594(5th Cir. 1994). Challenges to subject matter jurisdiction can be raised at any time and sua sponte by the court. *Johnston v. United States*, 85 F.3d 217, 218 n. 2 (5th Cir. 1996). The court of appeals has a duty to consider, sua sponte if necessary, the basis of the district court's jurisdiction. *Solsona v.*

Warden, F.C.I., 821 F. 2d 1129, 1132 n. 2 (5th Cir. 1987).

AFFIRMED.

U.S. COURT OF APPEALS
FILED
APR 17, 2002
CHARLES R. FULBRUGE, III CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

RONALD G. HARRIS and
SUSETTE M. HARRIS
PLAINTIFFS,

V. CIVIL ACTION
NO. H-99-1940

UNITED STATES OF AMERICA,
DEFENDANT.

MEMORANDUM OPINION AND ORDER

Pending before the Court are Plaintiffs Ronald G. Harris and Susette M. Harris's Motion for Summary Judgment (Inst. No. 23) and Defendant United States of America's Motion to Dismiss and for Summary Judgment (Inst. No. 24). After reviewing the record and the applicable law, the Court concludes that Plaintiffs' motion should be DENIED, and that Defendant's motion should be GRANTED.

I. FACTUAL BACKGROUND

In this tax case, Plaintiffs Ronald G. Harris and Susette M. Harris (the "Harrises") sue Defendant United States of America (United States) pro se for five instances of unauthorized collection actions and unauthorized disclosures of their tax return information.

The essential facts are undisputed. On May 7, 1993, the United States District Court for the Southern District of Texas, reduced the Harrises tax liability into an Amended Final Judgment. Specifically, the court, in Civil No. H-89-2543, ordered that the United States recover from Ronald G. Harris $99, 195.15 in unpaid federal income tax, and that the United States recover from Susette M. Harris $113,552.27 in unpaid federal in come tax. The court also ordered that the United States have federal tax liens over two tracts of the Harrises' real property to secure payment of the unpaid taxes by the Harries; the federal tax liens were superior in interest to the claims made by the Harrises' children. Moreover, the court's order granted permission to the United States to seize and sell the Harrises' property in satisfaction of the Harrises' tax liability. The Final Amended Judgment was filed in the Montgomery County Real Property Records.

The IRS's administration of the court's Final Amended Judgment lies at the heart of the instant action. In particular, the Harrises allege that April 14, 1997, the IRS officer assigned to administratively collect payment from the Harrises, Revenue Officer Carabeth Luckey ("Luckey"), unlawfully determined the Harrises' equity in their real property to be $45,000; this valuation was based on Luckey's perception that a break in the property's title would impose litigation costs on subsequent purchasers of the land. Moreover, the Harrises complain that on, June 5, 1997, Luckey rejected their Offer in Compromise in the amount of $16,000, and that Luckey informed them that

the minimum amount to process an Offer in Compromise would be $45,000. On June 19, 1997, when the Harrises eventually offered to compromise for $45001, Luckey and IRS Group Manager Barbara Howze ("Howze") informed the Harrises that only the Department of Justice ("DOJ") had authority to deal with offers in compromise. When Luckey subsequently advised the Harrises that the DOJ demanded an offer in compromise in the amount of $80,000, the Harrises demanded proof that their $45,001 offer had been, in fact, rejected by the DOJ. That Harrises allege that Luckey refused their demand for proof. The IRS auctioned the Harrises' property on June 24, 1997 for $45,000.

The auction was reported in the June 25, 1997 edition of the *Conroe Courier*, a periodical serving Montgomery County, Texas. In the article, Officer Luckey declined comment on the auction except to say that Harrises' tax liability totaled in the "hundreds of thousands of dollars." Additionally, the IRS public affairs officer Henry Holmes ("Holmes") was quoted in the news story as stating that IRS auctions only come "as a last resort" and that "we understand that when tax situations get to this point that people are very understandably going to be unhappy about it." Holmes also explained to the Conroe Courier that "the IRS really does not engage in the sale of property unless it's the end of the line and has become evident that the taxpayer cannot or will not be able to pay off their debt."

On June 21, 1999, the Harrises filed suit against the United States in this Court, alleging

the IRS engaged in unlawful collection practices and that the IRS engaged in unlawful disclosure of their private tax return information with their comments to the Conroe Courier article, as well as when Officer Luckey disclosed certain information to ABC Land Company on April 28, 1997.

II. Discussion

In its Motion to Dismiss and for Summary Judgment, the United States first argues that this Court does not have jurisdiction to entertain the Harrises' unauthorized collection claims because of subject matter jurisdiction exists for them to be heard. Specifically, the United States contends that the Harrises' have filed suit outside the two-year statute of limitations applicable to this case; consequently, the Harrises cannot pierce the United States sovereign immunity, See United States v. Dalm, 494 U.S. 596, 608(1990). ("Under settled principles of sovereign immunity, the United States, as sovereign, is immune from suit, save as it consents to be sued...and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit. A statute of limitations requiring that a suit against the Government be brought within a certain time period is one of those terms.") (quotations omitted).

The Court agrees. Title 26 U.S.C. §7433(a), the statute underlying each of the Harrises' claims, authorized a taxpayer to bring a civil action for damages against the United States when "any officer or employee of the Internal Revenue Service recklessly or intentionally, or by reason of negligence

disregards" any provision of the Internal Revenue Code or regulations promulgated thereunder. 26 U.S.C §7433(a); *Mason v. United* States of Am. No. 00CV00272, 2001 WL 241799, at *1(D.C. Cir. Feb. 2, 2001). Particularly relevant to the instant case, 26 U.S.C. §7433(d) provides: "Notwithstanding any other provision of law, an action to enforce liability created under this section may be brought without regard to the amount in controversy and may be brought only within 2 years after the date the right of action accrues. 26 U.S.C. §7433(d)(emphasis added).

As outlined above, the Harrises contend that all of the IRS's allegedly unlawful collection practices, e.g. Luckey's valuation of the Harrises' property; and Luckey and Howze's assertion that only the DOJ had authority to accept the Harrises' Offer in Compromise, occurred between April 14, 1997 and June 19, 1997. Indeed, in their First Amended Complaint, the Harrises make no claim of any unlawful collection action occurring after June 19, 1997. The Harrises, however, filed the instant action on June21, 1999, more than two years after their right of action accrued.[1] As a result, the United States has not waived sovereign immunity to those claims, and the Court is without jurisdiction to entertain them. "Because

[1] In their Response in Opposition to Defendants' Motion to Dismiss, the Harrises insist that they preserved their claims by filing their Original Complaint on June 21, 1999; however, an examination of the face of the Harrises' Original Complaint and of the Court's Docket Sheet reveals that the Original Complaint was in fact filed on June 21, 1999.

the 'time-bar qualifies a waiver of sovereign immunity,' it is jurisdictional in nature." *Overton v. United States*, 202 F.3d 282, at *2(10th Cir. 2000)(table). The claims are therefore dismissed for lack of subject matter jurisdiction.[2]

---

[2] Relatedly, the Court notes that in the Harrises' Supplement to Plaintiffs' Motion to Amend Original Complaint, they add claims involving the United States' alleged failure to send them a Notice of Intent to Levy. The addition of such claims is inappropriate because the Harrises' "supplement" is, in fact, an additional motion to amend their complaint; the supplement purports to add wholly new allegations, rather than merely augmenting claims already pleaded. As a result, the Court finds that the Harrises are not entitled to such claims.

Moreover, to the extent the Harrises' supplement is considered as another motion to amend, the Court denies the motion. While a motion to amend pleadings "shall be freely given when justice so requires, " Fed. R. Civ. P. 15(a), leave to amend is by no means automatic. *Addington v. Farmer's Elev. Ins. Co.*, 650 F.2d 633, 667 (5th Cir. 1981); *Vera v. Buch*, 980 F. Supp. 254, 255(S.D. Tex. 1997) panel op.); *Clemner v. Enron Corp.*, 882 F. Supp. 606, 608(S.D. Tex. 1995). When deciding whether an amendment should be allowed, the district court may consider the futility of the amendment. *Hypes v. First Commerce Corp.*, 134 F. 3d 721, 728(5th Cir. 1998). If the amendment is futile, the district court does not abuse its discretion in denying leave to amend. *Riley Stoker Corp. v. Fidelity and Guar. Ins. Underwriters, Inc.*, 26 F. 3dd 581, 591(5th Cir. 1994)(citing *Foman v. Davis*, 371 U.S. 178, 182(1982).

In this instant case, the Harrises' proposed amendment is futile because it alleges violations by the IRS that occurred on April 28, 1997, the day the levies were served. Again, the instant case was filed on June 21, 1999, more than two years after the Harrises' right of action accrued. The claims are therefore time-barred. See 26 U.S.C. 7433(d).

With regard to the Harrises' three claims of unauthorized disclosure, the United States moves for dismissal and for summary judgment, arguing that Officer Luckey's alleged disclosure to ABC Land Company occurred more than two years prior to the Harrises institution of the instant lawsuit, and that the IRS's two comments to the Conroe Courier did not constitute unlawful disclosures as a matter of law.

Again, the Court finds the United State's arguments well taken. First, the Harrises' allegations that Officer Luckey unlawfully disclosed tax return information to ABC Land Company must be dismissed because the alleged disclosure occurred on April 28, 1997. As discussed above, the instant case was instituted on June 21, 1999, more than two years after the Harrises' right of action accrued. Because 26 U.S.C. §7433(d) imposes a two-year limitation on claims bought against the IRS, the Court holds that the Harrises' particular claim regarding disclosures to ABC Land Company are dismissed for lack of subject matter jurisdiction. See Overton, 202 F.3d at *2.

Second, the United States is entitled to summary judgment on the Harrises' remaining two claims for unlawful disclosure. Under Rule 56(c)

of the Federal Rules of Civil Procedure, summary judgment is appropriate when the pleadings and record evidence show that no genuine issue of material facts exist and that, as a matter of law, the movant is entitled to judgment. *Little v. Liquid Air Corp.*, 37 F. 3d 1069, 1075(5th Cir. 1994). "[T] he substantive

law will identify which facts are material." *Anderson v. Liberty Lobby*, Inc., 477 U.S. 242, 248(1986). Only disputes about material facts will preclude the granting of summary judgment. Id. In a motion for summary judgment, the burden is on the movant. *Latimer v. Smithkline & French La.*, 919 F.2d 303(5th Cir. 1990). If the nonmovant bears the burden of proof at trial, however, the movant for summary judgment need not support the motion with evidence negating the opponent's case. Instead, the movant may satisfy its burden by showing that there s an absence of evidence to support the nonmovant's case. Id, *Little*, 37 F. 3d at 1075.

Once the movant makes this showing, the burden shifts to the nonmovant to sow that summary judgment is not appropriate. Little, 37 F.3d at 1075(citing *Celotex Corp. v Catrett*, 477 U.S. 317, 325(1986). "This burden is not satisfied with 'some metaphysical doubt as to the material facts'...by 'conclusory allegations'...by 'unsubstantiated assertions,' or by only a 'scintilla' of evidence. Id. (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586(1986); *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 871 73 (1990); *Hopper v. Frank*, 16 F.3d 92, 97(5th Cir. 1994); *Davis v. Chevron U.S.A., Inc.*, 14 F.3d 1082, 1086(5th Cir. 1994). Rather, the nonmoving party must "come forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita*, 475 U.S. at 587(quoting Fed. R. Civ. O. 56(e)). In determining whether a genuine issue for trial exists, the court must view all of the evidence in the light most favorable to the

nonmovant. *Richter v. Merchants Fast Motor Line, Inc.*, 83 F. 3d 96, 98 (5th Cir. 1996)(per curiam); *Gremillion v. Gulf Coast Catering Co.*, 904 F2d 290, 292(5th Cir. 1990).

As discussed above, the Harrises claim that Luckey's statement in the Conroe Courier that the Harrises' tax liability was "in the hundreds of thousands of dollars" violated 26 U.S.C. §6103. Similarly, the Harrises argue that Holmes violated §6103 when he made the following statement in the Conroe Courier:

> 1.We try to work with people and will work with them as far as we can, and we understand when tax situations get to this point that people are very understandably going to be unhappy about it...but there's really no alternative.
>
> 2.The bottom line is that we're not in the auction business, we're in the tax collection business, and on any given case, we would much rather collect the tax. We don't put something up for sale unless it's the last resort.
>
> 3.It's a difficult situation, and we certainly understand where a taxpayer wants to off their taxes but simply can't.
>
> 4. And we'll go as far as we can with the taxpayers, and I just hope other taxpayers understand that the IRS

> really does not engage in the sale of property unless it's the end of the line and has become evident that the taxpayer cannot or will not be able to pay off their debt.

Section 6103 mandates that "no officer employee of the United States... who has or had access to returns or return information...shall disclose any return or return information obtained by him in any manner in connection with his service as such officer or an employee...."26 U.S.C. §6103(a).

In its Motion for Summary Judgment, the United States argues that Luckey's comment falls outside §6103's prohibition because it was public information. Specifically, the district court had entered its Amended Final Judgment on May 7, 1993, detailing that Susette M. Harris had a tax liability of $113,552.26, and that Ronald G. Harris had a tax liability of $99, 195.15. Pursuant to Texas law, the judgment was entered into the records of the Montgomery County Courthouse because the Harrises' residence was located in Montgomery County.

While the United States concedes that §6103 contains no express exception authorizing the disclosure of tax information that has become a matter of public record, it nonetheless points to case law supporting the existence of such an exception. Indeed, as the United States correctly observes, circuits are split on the matter. Compare *William E. Schrambling Accountancy Corp. v. United States*, 937 F. 3d 1485(9th Cir. 1991)(holding that information contained in a Notice of Federal Tax Lien and in

a taxpayer's bankruptcy petition was no longer confidential information within the meaning of §6103), Mallas v. United States, 993 F.3d 111(4th Cir. 1993)(concluding that the lack of an express exception for public information in §6103 indicated no exception exists). As the Ninth Circuit explained in recognition of the exception, "Congress sought to prohibit only disclosure of confidential tax return information. Once tax return information is made a part of the public domain, the taxpayer may no longer claim a right of privacy of that information. Thus if a taxpayer's return information is lawfully disclosed in a judicial proceeding..., the information is no longer confidential and may be disclosed again without regard to section 6103." Lampert v. United States, 854 F. 2d 335, 337-38(9th Cir. 1988), cert denied, 490 U.S. 1034(1989). The Seventh circuit, rather than adopting a "public record" exception, instead embraced the "immediate source" test, where §6103 is not implicated if the "immediate source [of the taxpayer information] is a public document lawfully prepared by agency that is separate from the [IRS] and has lawful access to tax returns." *Thomas v. United States*, 890 F.2d 18, 21(7th Cir. 1989).

At the time of the alleged disclosures of the instant case, the Fifth Circuit had not articulated a rule regarding the contours of §6103 disclosure; two months later, however, the Fifth Circuit adopted the Seventh's Circuit "immediate source" test in *Johnson v. Sawyer*, 120 F.2d 1307(5th Cir 1997). As the Johnson court held, "If the immediate source of the information claimed to be wrongfully disclosed is

tax return information ("return" or "return information" pursuant to §6103), the disclosure violates §6103, regardless of whether that information has been previously disclosed (lawfully) in a judicial proceeding and has therefore arguably lost its taxpayer' confidentiality." *Id.* At 1318-19. Thus, while the Fifth Circuit has adopted the "immediate source" standard, it has rejected the notion that mere "public information" lies outside the scope of §6103. See ID. ("[W] e decline to follow the Ninth and Sixth Circuits and judicially create an exception to §6103 for tax return information disclosed in 'public records.'")

In this case, the Court rejects the United State's argument that it is entitled to summary judgment merely because the Harrises' tax liability was public information. That is not the standard the Fifth Circuit articulated in Johnson. Moreover, the record is unclear whether the "immediate source" of Officer Luckey's comments regarding the Harrises' tax liability was public court documents or from her own personal knowledge as an agent working on the Harrises' case. A genuine issue of material fact thus exists as to whether Luckey's comment to the Conroe Courier that the Harrises owed "in the hundreds of thousands of dollars" violated §6103's prohibition.

See 26 USC §6103(b)(2)(A)(prohibiting specifically the disclosure of a taxpayer's tax liability).

Nonetheless, the United States is entitled to summary judgment on the matter by virtue of 26 U.S.C. §7431(b)'s "good faith exception." Section 7431(b) provides that "[n]o liability shall

arise under this section with respect to any inspection or discourse...which results form a good faith, but erroneous interpretation of section 6103...." 26 U.S.C. 7431§(b). " Congress intended that 'disclosures which give to civil liability are limited to those situations where the unauthorized disclosure results from willful or negligent failure of the person to comply with the procedures and safeguards provided' under §6103..." *Elias v. United States*, No. CV 90-0432-WJR (JRX), 1990 WL 264722, at *9 n. 2(C.D. Cal. Dec 21, 1990)(citing Joint Committee, General Explanation of the Tax Reform Act of 1976, Pub.L. No. 94-455, 94th Cong. 2d Sess. At 345(1976-3 Cum. Bull. (Vol. 2) at 357). The Fifth Circuit has held that the test for good faith under §7431(b) "should be judged by an objective standard [where]...'[an agent's] conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Huckaby v. United States*, 794 F.2d 1041, 1048(5th Cir. 1986))(quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818(1982)), cited in, *Gandy v. United States*, 234 F.3d 281, 285(5th Cir. 2000). The court in Huckaby also state that, with regard to the good faith standard, "a reasonable IRS agent would have known of rights provided by these [Internal revenue Code] sections, and his own agency's applicable regulations and internal rules. Id.

In the instant case, the Court finds that Luckey's comment to the Conroe Courier was in good faith as a matter of law because her conduct did not violate clearly established statutory or constitutional rights with regard to

the Fifth Circuit's interpretation of §6103. At the time her comment was made, the Fifth Circuit had not decided *Johnson v. Sawyer*, and it is undisputed that state of the law in the Fifth Circuit was unsettled, and that a split existed among the circuits regarding whether a disclosure of "public information" fell outside the scope of §6103. Moreover, the IRS's own disclosure rules, promulgated in the Disclosure of Official Information Handbook, IRM 1272, provided that "Internal Revenue Service policy permits and encourages press releases and responses to media inquiries regarding enforcing activities that have become a matter of public record..." *Id.*at (11)(14) 0(Rev. 1-10-95)(emphasis added). Luckey's comment therefore did not contravene either Fifth Circuit law or IRS policy at the time it was made. Under the standard articulated in *Huckaby*, good faith underlay Luckey's comment as a matter of law. See *Huckaby*, 794 F.2d 1048(establishing that good faith exists for a §6103 disclosure when the disclosure "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known").

With regard to Officer Holmes's general comments on IRS enforcement practices, the Court similarly finds that they did not reveal the Harrises's tax return information in violation of §6103. According to the statute, a taxpayer's "return information" included:

> a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld,

deficiencies, overassessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense....26U.S.C. §6103(b)(2)(A).

As indicated above, Holmes's comments to the Conroe Courier pertained to general principles of IRS tax enforcement, *vis a vis* IRS auctions. It is undisputed that Holmes did not identify the Harrises by name, nor did he provide any detail regarding their income, assets, liabilities, net worth, deficiencies, or payments. Holmes also did not mention any other investigations pending, or possibly pending, against the Harrises. Rather, the Court finds that Holmes's comments were strictly general in nature, and as such were outside the scope of §6103's prohibition on tax return disclosure. *CF Mittleman v. U.S. Dep't of Treas*ury, 919 F. Supp. 461, 468(D.D.C. 1995)("[A] statement of general provisions of law does not implicate the general nondisclosure provisions of the Privacy Act."). The United States is entitled to summary judgment on the Matter.

III. CONCLUSION

In this case, the Harrises sue for alleged unlawful collection actions and alleged unlawful

disclosures. Because three of the five violations occurred more that two years before the Harrises filed the instant suit, the claims are time-barred, and the Court has no jurisdiction to adjudicate them. The two claims that are not time barred, involving statements made by Revenue Officers Luckey and Holmes did not violate §6103 because the former was made in good faith, and the latter did not contain information within the scope of the statute. Accordingly, the Court

ORDERS that Plaintiffs' motion for Summary Judgment is DENIED;

ORDERS that Defendant's Motion to Dismiss and for Summary Judgment is GRANTED;

ORDER that Plaintiff's time–barred claims are DISMISSED. SIGNED at Houston, Texas, this 31st of March, 2001.

S:/ MELINDA HARMON

UNITED STATES DISTRICT JUDGE

UNITED STATES COURTS

SOUTHERN DISTRICT OF TEXAS

ENTERED APR 2-2001

MICHAEL N. MILBY

CLERK OF COURT

Supreme Court, U.S.
FILED
FEB 10 2003
CLERK

No. 02-900

In the Supreme Court of the United States

RONALD G. HARRIS AND SUSETTE M. HARRIS,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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13 pp

QUESTION PRESENTED

Whether an allegedly improper disclosure of tax return information gives rise to liability when it "results from a good faith, but erroneous, interpretation of section 6103" of the Internal Revenue Code. 26 U.S.C. 7431(b).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	4
Conclusion	9

TABLE OF AUTHORITIES

Cases:

Funding Sys. Leasing Corp. v. *Pugh*, 530 F.2d 91 (5th Cir. 1976)	8
Harlow v. *Fitzgerald*, 457 U.S. 800 (1982)	6
Huckaby v. *United States Dep't of the Treasury*, 794 F.2d 1041 (5th Cir. 1986)	6
Johnson v. *Sawyer*, 120 F.3d 1307 (5th Cir. 1997)	3, 6, 7
Lampert v. *United States*, 854 F.2d 335 (9th Cir. 1988), cert. denied, 490 U.S. 1034 (1989)	7
Mallas v. *United States*, 993 F.2d 1111 (4th Cir. 1993)	7
Rice v. *United States*, 166 F.3d 1088 (10th Cir.), cert. denied, 528 U.S. 933 (1999)	7, 8
Rodgers v. *Hyatt*, 697 F.2d 899 (10th Cir. 1983)	7
Rowley v. *United States*, 76 F.3d 796 (6th Cir. 1996)	7
Thomas v. *United States*, 890 F.2d 18 (7th Cir. 1989)	7, 8
William E. Schrambling Accountancy Corp. v. *United States*, 937 F.2d 1485 (9th Cir. 1991), cert. denied, 502 U.S. 1066 (1992)	7

Statutes: Page

Internal Revenue Code (26 U.S.C.):
Section 6103 ..... 3, 4, 5, 6, 7, 8
Section 6103(a) 5
Section 6103(b)(2)(A) 5
Section 6103(c)-(o) 5
Section 7431 2
Section 7431(a) 5
Section 7431(b) 4, 5, 6, 7, 8
Section 7431(b)(1) 3, 5

Miscellaneous:

Internal Revenue Service Manual: Disclosure of Official Information Handbook (rev. Jan. 10, 1995) 6

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3-10) and the opinion of the district court (Pet. App. 11-26) are both unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 17, 2002. The petition for rehearing was denied on July 1, 2002. Pet. App. 1-2. The petition for a writ of certiorari was filed on September 30, 2002 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On May 7, 1993, the United States obtained a judgment for unpaid federal income taxes against Ronald G. Harris and Susette M. Harris (petitioners) in the respective amounts of $99,195.15 and $113,552.27. Pet. App. 12. An Internal Revenue Service (IRS) revenue officer named Carabeth Luckey was directed to take appropriate steps to collect that judgment. *Ibid.* On June 24, 1997, petitioners' residence was sold at an IRS auction for $45,000. *Id.* at 13. The proceeds of that sale were applied to petitioners' unpaid tax liabilities.

The property auction was reported in the June 25, 1997, edition of the *Conroe Courier*, a periodical serving Montgomery County, Texas. The article noted that Revenue Officer Luckey had declined comment on the auction except to say that petitioners' tax liability totaled in the "hundreds of thousands of dollars." Pet. App. 13. The article also quoted Henry Holmes, an IRS spokesman, as saying that "the IRS really does not engage in the sale of property unless it's the end of the line and has become evident that the taxpayer cannot or will not be able to pay off their debt." *Ibid.*

2. On June 21, 1999, petitioners filed a complaint in the district court seeking damages under Section 7431 of the Internal Revenue Code for the alleged disclosure of their tax return information to the *Conroe Courier*. Pet. App. 13-14. Petitioners thereafter filed an amended complaint. *Id.* at 9. The government filed an answer to the original complaint but did not file an answer to the amended complaint. Instead, after the amended complaint was filed, the government filed a motion to dismiss and for summary judgment arguing that the comments in the newspaper article did not

constitute unlawful disclosures as a matter of law. The government's motion was based on the undisputed fact that the information contained in the newspaper article was in the public record before that article was published.[1] The government also argued that, even if the alleged disclosure was improper, it did not give rise to any liability because it was based on "a good faith, but erroneous, interpretation" of the disclosure rules set forth in Section 6103 of the Code. See 26 U.S.C. 7431(b)(1). Pet. App. 9, 20-23.

3. The district court held that the United States was not entitled to summary judgment merely because petitioners' tax liability was a matter of public record. Pet. App. 22. Applying the decision of the Fifth Circuit in *Johnson* v. *Sawyer*, 120 F.3d 1307 (1997), the district court held that a disclosure of information that is already in the public record may be actionable if the "immediate source" of the information disclosed is tax return information. Pet. App. 21-22. The district court concluded that it was unclear in this case whether the "immediate source" of the revenue officer's comments about petitioners' tax liability was the public court documents or the officer's own personal knowledge of IRS files. The court therefore held that there is a genuine issue of material fact as to whether the revenue officer's comments violated 26 U.S.C. 6103. Pet. App. 22.

The court nonetheless awarded summary judgment to the United States on alternative grounds. The court

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[1] The government supported its motion for summary judgment with the deposition of Revenue Officer Luckey, who stated that, when she was asked by the reporter about the amount of the liability, she was referring to the amount set forth in the publicly filed judgment against petitioners for unpaid taxes. R. 429.

held that, even if the revenue officer's comments violate Section 6103, they fall within the "good faith" safe harbor of 26 U.S.C. 7431(b). The court explained that the revenue officer's response to the newspaper's inquiry represented a "good faith" interpretation of her obligations under Section 6103 because the law in the Fifth Circuit was not "clearly established" at the time that her statements were made to the newspaper. Pet. App. 23-24.[2]

4. The court of appeals affirmed *per curiam*. Pet. App. 3-10. The court noted that "a violation of § 6103 did not occur" if a public record—such as the federal district court tax judgment—was the "immediate source" of the information concerning petitioners' tax liabilities given to the newspaper. *Id.* at 7-8. The court agreed with the district court, however, that it was unnecessary to resolve any question of fact regarding the "immediate source" of that information because "the disclosure was nevertheless subject to the good faith defense of § 7431(b)." *Id.* at 8.

In so ruling, the court of appeals rejected petitioners' argument that the government had waived the good faith defense by failing to raise it in its answer. The court explained that the good faith defense is a limitation on the government's waiver of sovereign immunity and therefore may be raised at any time. Pet. App. 9.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any

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[2] The court also held that the "general comments on IRS enforcement practices" by IRS spokesman Henry Holmes "did not reveal the [petitioners'] tax return information." Pet. App. 24. Petitioners do not challenge that ruling in the petition.

other court of appeals. Further review is therefore not warranted.

1. Section 6103(a) of the Internal Revenue Code specifies that tax "[r]eturns and return information shall be confidential" and may not be disclosed "except as authorized by [the Code]." 26 U.S.C. 6103(a). Section 6103(b)(2)(A) of the Code defines return information to include information about a taxpayer's identity, the nature, source, or amount of his income, payments, net worth, tax liability, or deficiencies. 26 U.S.C. 6103(b)(2)(A). Subsections (c) through (o) of Section 6103 then provide several specific exceptions to the general rule of nondisclosure.

Section 7431(a) of the Code establishes a cause of action against the United States and provides a damages remedy if a federal officer or employee makes an unauthorized disclosure of a "return or return information." 26 U.S.C. 7431(a). Section 7431(b)(1) provides, however, that no liability shall arise under this section "with respect to any * * * disclosure * * * which results from a good faith, but erroneous, interpretation of section 6103." 26 U.S.C. 7431(b)(1).

Petitioners assert that the IRS improperly disclosed their return information when Revenue Officer Luckey told a newspaper reporter that their liability was in the "hundreds of thousands of dollars." The question whether that statement constituted an unauthorized disclosure of tax return information, however, was not reached and was not decided by either of the courts below. Pet. App. 7-8, 22. Instead, the courts below held that, even if that statement constitutes a disclosure of return information in violation of Section 6103, the United States was not liable for any damages because such statements fall within the good faith exception of Section 7431(b).

A disclosure is based on a good faith but erroneous interpretation of Section 6103—and therefore falls within the good faith exception of Section 7431(b)—if it does not violate clearly established law. *Huckaby* v. *United States Dep't of Treasury*, 794 F.2d 1041, 1048 (5th Cir. 1986). The test for good faith is thus similar to the test applied to claims of qualified immunity in *Bivens* actions, under which the trial judge is to determine whether the defendant's actions were "objective[ly] reasonable[ ]" with reference to "clearly established law" at the time of the conduct in question. *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818-819 (1982).

At the time of the revenue officer's statements in this case, there was no clearly established law about the publication of return information that is also set forth in publicly available records. The Fifth Circuit had not then adopted the rule that Section 6103 prohibits the disclosure of such information unless the "immediate source" of the disclosure was the public record instead of the taxpayer's return. *Johnson* v. *Sawyer*, 120 F.3d at 1323; see Pet. App. 7-8. Moreover, the Internal Revenue Manual has long advised IRS employees that the disclosure of information that exists in the public record is not barred by Section 6103. *Internal Revenue Service Manual: Disclosure of Official Information Handbook*, para. (11)(14)0, at 1272-130 (rev. Jan. 10, 1995). At the time of the statements of the revenue officer in this case, there was thus no clearly established rule that her statements were prohibited under that Section.

2. Petitioners correctly note (Pet. 6) that there is a conflict in the circuits concerning whether Section 6103 precludes the disclosure of return information that is

already in the public record.[3] That conflict, however, is not implicated by the decision in this case. The courts below did not reach the question whether the statements of the revenue officer about petitioners' existing tax liabilities violated Section 6103. Instead, the courts held that, even if the statements did violate that statute, they nonetheless fell within the good faith exception to liability under Section 7431(b) of the Code. Pet. App. 8, 22-23. The decision in this case thus does not present the question on which the circuits have divided.[4]

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[3] Some courts have held that once return information becomes part of the public record, it loses its confidentiality and may be disclosed by the IRS without violating Section 6103. *Lampert* v. *United States*, 854 F.2d 335 (9th Cir. 1988), cert. denied, 490 U.S. 1034 (1989); *William E. Schrambling Accountancy Corp.* v. *United States*, 937 F.2d 1485 (9th Cir. 1991), cert. denied, 502 U.S. 1066 (1992); *Rowley* v. *United States*, 76 F.3d 796 (6th Cir. 1996). Other courts, however, have held that tax return information retains its confidentiality even when it has become part of the public record and that the IRS therefore may not disclose such information from its files. *Mallas* v. *United States*, 993 F.2d 1111 (4th Cir. 1993); *Rodgers* v. *Hyatt*, 697 F.2d 899 (10th Cir. 1983); *Rice* v. *United States*, 166 F.3d 1088 (10th Cir.), cert. denied, 528 U.S. 933 (1999); *Thomas* v. *United States*, 890 F.2d 18 (7th Cir. 1989); *Johnson* v. *Sawyer*, 120 F.3d 1307 (5th Cir. 1997).

[4] Even if the courts below had reached that question and ruled in favor of the government on the ground that the "immediate source" of revenue officer Luckey's statements was the public information contained in the district court's judgment, rather than the IRS's files, that decision would also not have implicated the existing conflict among the circuits concerning whether tax return information loses its confidentiality under Section 6103 once it has become a matter of public record. While some circuits have ruled that such information may retain some degree of protection under Section 6103 (see note 3, *supra*), no court has held that the IRS violates Section 6103 when it publishes information from a public

3. Petitioners err in asserting (Pet. 9) that the government waived its good faith defense under Section 7431(b) when it failed to assert that defense in its answer. The United States filed an answer and amended answer to petitioners' original complaint, but it did not file an answer to petitioners' amended complaint. Instead, the government's motion to dismiss and for summary judgment (in which it raised the good faith defense of Section 7431(b)) was the "initial pleading tendered by defendant" with respect to the amended complaint. See Pet. App. 9. Because an affirmative defense may be raised by motion for summary judgment when the motion is the "initial pleading tendered by defendant" (*Funding Systems Leasing Corp.* v. *Pugh*, 530 F.2d 91, 96 (5th Cir. 1976)), the government properly raised the good faith defense by motion in this case.

In concluding that the government had properly raised the "good faith" defense, the court of appeals stated that this defense is jurisdictional (because it is part of the government's waiver of its sovereign immunity) and therefore may be raised at any time. Pet. App. 9. That additional rationale of the court of appeals creates no conflict and does not, in any event, warrant review by this Court. The government properly raised this defense by motion, and petitioners plainly suffered no prejudice from the presentation of this defense by motion rather than by answer to the amended complaint.

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record that is also contained in the tax return information held by the agency. Indeed, the Seventh and Tenth Circuits have both held that the publication of such publicly available information does not violate Section 6103. *Thomas* v. *United States*, 890 F.2d 18 (7th Cir. 1989); *Rice* v. *United States*, 166 F.3d 1088 (10th Cir.), cert. denied, 528 U.S. 933 (1999).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 2003